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THE VALUATION OF PROPERTY IN THE EARLY COMMON LAW¹

THERE are probably ten thousand cases in the English and American law reports on the proper methods of valuing property for various judicial and administrative purposes. These decisions, however, are nearly all subsequent to the middle of the nineteenth century, and when we seek the origin of the present rules of valuation in the earlier law we are unexpectedly confronted with an almost total absence of authorities. So few, indeed, are the early precedents upon this subject which the writer has been able to discover, that he would shrink from publishing the results of his investigation if it were not for two considerations. In the first place any discussion of the great mass of valuation law which has accumulated during the past half century should, on general principles, be preceded or accompanied by a study of the earlier authorities, if there are any. A historical introduction is generally and properly considered necessary to the treatment, whether theoretical or practical, of any branch of law. And if it turns out, as to that particular subject, that all the law on it is of modern origin, this very fact may be useful in the construction of statutes and contracts, and in the further development of this branch of jurisprudence.

¹ This article, like that on the Roman law which appeared in the January number of this REVIEW (vol. 34, pp. 229-259), was originally prepared for possible use as a chapter in a general treatise on the law of valuation. The writer submits that the former article revealed the existence of an unexpected amount of ancient law, relating to rules, methods, and evidence in the valuation of property for legal purposes. The results of the present inquiry, however, are practically negative, and it may be doubted whether they are worth publishing in any form. The best excuse for doing so is the hope that the curiosity or industry of others may be stimulated to discover sources and authorities which the writer has overlooked. The inherent difficulties of the subject matter, the mixture of languages, the exasperating abbreviations, the Gothic type, the bad print, and the absence of indexes should make the most industrious investigator of legal topics between Edward I and the time of Coke reluctant to assume that he has overlooked nothing of importance.

The writer wishes to acknowledge his indebtedness to Miss Bertha H. Putnam, assistant professor of history in Mount Holyoke College for her kindness in permitting him to inspect her copy of one of the Marrow manuscripts, and to Mr. C. H. Baesler, Harvard Law School 1919, for general assistance in the preparation of the article.

The absence in the Anglo-American common law, until a relatively recent date, of all discussion of the methods of valuing property is difficult to reconcile either with the fact that the decisions on value in cases of trespass, trover, contract, taxation and eminent domain are now accumulating at the rate of about five hundred per annum, or with the fact that judicial or administrative valuations for all these purposes have been common during several generations, and for some of these purposes during many centuries.

Equally strange, in view of the frequency of contact in the formative period of the common law with the principles of the Roman law, is the total ignorance displayed by our professional ancestors of the rules and methods of valuation which obtained in that system of jurisprudence. While the effort of Bracton to romanize the English law was a failure, both as to theory and procedure, Latin was nevertheless the language of our legal writers for about two centuries, and of our legal documents for six; references to and quotations from the Roman jurists are to be found in every period; and the development of some branches of our law has been considerably affected by the learning of the civilians, ancient or modern. It is cause for astonishment, therefore, not only that no use was ever made in England of the carefully worked out principles of valuation to be found in the Roman law, but that the whole terminology of the subject, as it appears in the Digest, was ignored.²

The first treatise on English law, Glanville's "*Tractatus de legibus et consuetudinibus regni Angliae*," which dates from about the year 1187, contains a significant question. Where a thing loaned has been lost by the borrower Glanville says that he must pay its reasonable value. "*Ad rationabile pretium mihi restituendum.*" He adds, however, "*sed sub qua vel cujus probatione prae-standum . . . in quantum id emendare debeat vel sub qua probatione vel cujus idem fit judicandum, quaero.*"³ It was nearly seven hun-

² An amusing illustration of the failure of Bracton's efforts to identify Roman procedure with English practice is furnished by the conversion in fol. 183 b of BRITTON — a book written only a generation later than BRACTON'S DE LEGIBUS — of the *actio familiae heriscundae* (correctly described by Bracton, fol. 100 b and fol. 443 b, also by Fleta, bk. 5, ch. 9, § 2, as an action for the division of inheritances) into an action named after a lady of the Heriscunda family! See the notes to Nichols' edition of BRITTON, vol. 2, p. 65. All the surviving manuscripts seem to contain the same error.

³ GLANVILLE, bk. 10, ch. 13.

dred years before our courts began to give serious consideration to this and similar questions. Yet from the beginning valuations of real estate must have been necessary in proceedings of dower, in partitions for other purposes, in the determination of a *valor maritagii*, and in other cases; and the "subsides" of the middle ages involved the valuation for taxation of some kinds of personal property. Later on, as the action of trespass was developed, personal property of all sorts had to be valued by the court or jury both in proceedings *quare clausum fregit* and in actions *de bonis asportatis*. So also in detinue and replevin. Then came actions of trover, which extended very much the field of valuation practice. Property valuations, whether of lands or chattels, whether capital or annual, were also involved in writs of elegit, debt, waste, warranty, and in extents for various purposes. Yet throughout this long period of time we find little or no valuation law. Questions of value seem to have been left to the decision of the court or jury in each case, with no thought that there was any need for uniformity of decision, that is for the elaboration of rules of law.

Pollock and Maitland refer to a twelfth century grant in which the relief which must be paid on the grantee's death by his son is described as "*tantum pecunie quantum nobilis homo dare debet pro tali terra*." This may be an attempt to establish a standard of value; but, so far as we have discovered, it is confined to a single deed.⁴ Bracton says that the annual value of an advowson is to be figured at what it is worth "*singulis annis secundū cōmunem aestimationem*;"⁵ but no further explanation of this basis of valuation is given. In discussing the law applicable to the case mentioned by Glanville, Bracton merely says, without comment or question, that the defendant *vel ad ipsam restituendam tenetur vel ejus precii*.⁶

Nothing has been found in Fleta, Britton or the early statutes and Year Books which throws any light upon the basis or methods of

⁴ I HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 316. The authors of this learned work also refer (p. 291) to a good definition of annual value — "the best rent that can reasonably be gotten" — as sometimes used in grants in socage tenure. In neither case is the authority given.

⁵ DE LEGIBUS ET CONSUETUDINIBUS ANGLIÆ, circa 1256, fol. 75 b. Compare this phrase with the "rule of common estimation" in our colonial tax system. See, for instance, the Massachusetts Tax Act of 1651. COL. REC., 3, 287.*

⁶ De Legibus, fol. 99 b.

valuation, except that market value, meaning price current, called by Fleta *forum bladi*,⁷ and by Britton the *foer coraunt de ble*,⁸ is defined in the statute of 31 Edward I (1304) entitled the "*Parva Custuma*" as "*pretium pro quo ipsi mercatores aliis hujusmodi mercimonia vendere possint.*" This is a good definition of market value in the sense of current price, as we understand it.⁹

The phrase *secundum (or juxta) verum valorem* is frequently found in the Latin texts, and "*la verraye value*" in the French ones of this period. Stat. 4 Edw. III, ch. 3 (1330), recites that corn, etc., taken for the King's use, having been paid for "a meydru value qils ont value," should thereafter be appraised and paid for "a la vroie value." The phrase becomes in English the "verrey value,"¹⁰ later "very value."¹¹ The words themselves might be regarded as a translation into medieval Latin and French of the *verum pretium* of the Roman law, if it were not that this concept of value was a technical and highly artificial one,¹² of which there is no trace in English law. These phrases seem, from the context, to mean merely the real or actual value of the property.

The acts for the regulation of the prerogative of purveyance contain definitions of current price and also what may, it is submitted, be regarded as instances or anticipations of the law of eminent domain. The *pretium regium* of medieval continental Europe was fixed under the *jus quod regi competit res mercales comparandi certo et definito pretio*; and an earlier instance, from the Roman law itself, of the exercise of what afterwards came to be known as *jus regium* is furnished by the edict of A. D. 491.¹³ The earliest reference to the subject in England is found in Magna Carta, ch. 28 (1215), wherein it is provided that no corn shall be

⁷ COMMENTARIUS JURIS ANGLICANI, bk. 2, c. 11.

⁸ BRITTON, fol. 75 b.

⁹ See also "*le sort et pris due pays*" in STAT. 15 EDW. III, ch. 5 and 6, and the definition in 36 EDW. III, ch. 32 referred to below.

¹⁰ OXFORD DICT., A. D. 1338.

¹¹ See *Bond v. Tricket*, Cro. Eliz. 853, case 12, and *Noy*, 38 (1602), where the annual value of an ecclesiastical benefice is held to be its "very" or present full value, not the value put upon it in the official valuation of some earlier period. And see *Sharpe v. French*, Lutw. 1301 (1684) where the value according to the King's Books is contrasted with the *realis valor*, or *modo clari annui valor*, of the time of trial. See also *Ashby v. Power*, 3 Gwillim's Tithe Cases, 1238 (1781).

¹² See 34 HARV. L. REV., 231, 241-244.

¹³ See Ducange's Glossarium, and 34 HARV. L. REV. 240, 254.

taken by any constable, etc. *nisi reddat denarios*, that is without compensation; but the basis of payment is not specified. The act of 4 Edw. III (1330), fixing the price at the "vroie value" has already been referred to; and stat. 36 Edw. III, ch. 2 (1362) provides specifically that payment shall be made at "le pris pr quel autiels vitailles sont venduz cœement en marcheés environ."¹⁴

In *Filow's case*¹⁵ there is a long discussion as to what makes a deer, dog or other animal the subject of private property so that its owner may maintain trespass for the loss of it, and several of the judges evidently thought that when an animal was private property its utility for its owner's mere pleasure was a proper element of value. This is in accord with modern law.¹⁶

The foregoing precedents are the meager results of much reading; and they amount to little or nothing as explanations of the legal methods for valuing property which obtained in medieval England.

In the fifteenth and sixteenth centuries discussions over questions of value seem to have been confined to the matter of language considered below. A study of the Year Books of this period fails to reveal any valuation law; and the same statement holds good of

¹⁴ In the recent case of Attorney General *v.* DeKeyser's Hotel, [1920] A. C. 508 which involved the right of the Crown in time of war to take over a hotel for use in connection with the national defense, the lower court decided in 34 T. L. R. 329 (1918) that no compensation except that offered by the government was due the owner. The case was appealed, and pending its decision it was agreed that an exhaustive search should be made of the ancient records and other precedents bearing on the question. The result of this search was negative; but from the fact that no case was found in which property had been taken under the royal prerogative but not paid for, the Court of Appeals in [1919] 2 Ch. 197 reversed the decision of the lower court; and in [1920] A. C. 508 this decision of the Court of Appeals was affirmed by the House of Lords. The writer of the present article cannot refrain from calling attention to the inconclusiveness of this investigation, with all the money of the government behind it, into medieval English law on the subject of value. It also seems to him that some of the precedents which are cited in this article as showing that when the prerogative of purveyance was exercised the goods were to be paid for at their market value, were not discovered in the investigation in the De Keyser case; and it certainly is the fact that the various judges who rendered opinions in this case seem to be entirely ignorant of the general practice in such matters which obtained throughout medieval Europe, and also of the learned opinions which are to be found in a half a dozen American state court decisions on the right of the property owner to compensation when his property is taken for a public use, notwithstanding the absence of any provision in the state constitution to that effect.

¹⁵ Y. B. 12 H. 8, p. 3 (1520).

¹⁶ See the discussion of luxury values in the Roman law, 34 HARV. L. REV. 251.

the "abridgements" and other law books from Fortescue, Statham, and Littleton to Coke.

During the sixteenth and seventeenth centuries, an active controversy prevailed over the question whether *pretium* or *valentia* was the proper word to use for the value of the property in a writ of trespass or an indictment for larceny. As the controversy over this question of pleading seemed to open up an obvious field for the discussion of kinds or definitions of value, the precedents and cases bearing on the subject have been carefully studied.

Before taking up this question it will be necessary to give a short account of the words and phrases used in the Latin, French, and English sources of the common law to indicate the value of property.¹⁷ The word *pretium*, which was the ordinary Latin word for value, as well as for price, both in common speech and in the Roman law, is found in Glanville, Bracton, Fleta and the early statutes, in both senses; but before the time of these writings other words had been invented by medieval writers to fill the gap in the Latin language caused by the absence of any word used exclusively for value as distinguished from price. A great number of words were coined during the Middle Ages, mostly out of the verb *valere*, and used as nouns to indicate value in the broader sense. Ducange's Glossarium (1681) gives *valens*, *valentia* (1080), *valetudo* (1175), *valor*, *valorium* (1092),¹⁸ and many others. The only words

¹⁷ Down to the time of Edward I statutes, charters and legal writings of every kind, including the treatises of Glanville, Bracton, and Fleta are in Latin; and this language continued to be used in deeds and miscellaneous documents for several centuries, and in writs and other judicial papers until the eighteenth century. French was generally substituted for Latin in the acts of Parliament in the time of Edward I, and "Britton" was written in that language, *circa* 1290. It is also the language of the Year Books. This was poorly spelled thirteenth-century French, but still French. About the time of the accession of Henry VII, English came into use for the statutes; but the legal authors of the period, including Littleton, Statham, Fitzherbert, Brooke and others down to the time of Coke, used in their writings and "abridgements" a jargon of French, Latin, and English, which continued to be the favorite language of the reports until towards the close of the seventeenth century.

¹⁸ All these post-classic substitutes for the *pretium*, *aestimatio* or *utilitas* (as to when these words meant value and when something else, see 34 HARV. L. REV. 241-247) of the Roman law, probably originated in popular usage in the Middle Ages, and were then taken up by the law writers. One of these substitutes, *valor*, is said by an early lexicographer to have been used by Pliny the Elder in the sense of value; but no one has been able to find the passage. The dictionary writer probably confused the prac-

in this list which came into common use in England were *valor* and *valentia*, which appear in legal writings as early as the twelfth century and continued to be employed (for writs and indictments) down to the eighteenth century. Glanville, as already noted, used the word *pretium* as the equivalent of value in the phrase "*rationabile pretium*," the reasonable price or value of an article which the borrower has lost and must account for. He also uses *valentia* when describing a writ to recover land from which the plaintiff's ancestor had taken profits or produce *ad valentiam* so many shillings.¹⁹ Bracton uses *pretium* in the sense of price²⁰ and also for value generally;²¹ that is, he employs the word in both of its Roman-law meanings. He also makes frequent use of *valor* and *valentia*. The same indifferent use of the three words is found in the writs collected and published under the title of Bracton's Note Book;²² but *valor* and *valentia* are more common than *pretium*. The same statement may be made as to Fleta. Both *valor* and *valentia* are found in the acts of Parliament when these were written in Latin; also in the Court Rolls, the Parliamentary Rolls, the Assize Rolls, and in charters and other legal documents of the early period.

After the substitution, *tempore* Edward I, of French for Latin in the acts of Parliament, the word uniformly used in these documents is the old-French "value," long since obsolete in the language of its origin. This is also the word used in the Year Books, by Britton, and by all the later law writers who composed their works in Anglo-Latin-French. Once in awhile we meet with varia-

tice of his own day with an unverified recollection of a passage in Pliny. See a similar mistake by the English poet Marlowe noted below p. 22.

Professor Leo Wiener of Harvard has been kind enough to assist the writer in tracing back the use of *valor* and *valentia*, with the result that the former word is found in the Laws of Canute, 1027-1034 (Liebermann's *Gesetze der Angelsachsen*, 2, p. 327), and in the book on Norman custom law known as "*Summa de legibus Normannie in curia laicali*" (ed. E. Tardif, 2 pp. 233, 326), which is supposed to have been written at least as early as the first part of the 12th century; and that the words *ad valenciam* appear in the Anglo-Norman "*Leis Willelme*," the Latin translation of which dates from about 1200 (Liebermann, *op. cit.* 493, 505, 517, 519), and in the "*Leges Henrici*," 1114-1118, the Latin texts of which also go back to the year 1200 (Liebermann, *op. cit.* 575).

¹⁹ Bk. 2, ch. 3.

²⁰ DE LEG., fol. 61 b; 208 b; 39 b.

²¹ *Ib.*, fol. 99 a *ad fin*; 102 b; 146 a. The word is mistranslated in the Travers Twiss edition as "price;" what Bracton evidently meant was "value."

²² Edited by F. W. Maitland, 1887.

tions such as "vaillance," also with "montance" and "pris;" but the word generally used was "value," treated indifferently as either masculine or feminine.

The English "value" is of course the old-French word, and appears in general literature as early as 1303.²³ It is the only word used in the Acts of Parliament after these began to be published in English about the year 1485; but *valentia* continued to be employed in writs and other legal documents for two hundred years more. *Valor* also was in use for the writ *de valore maritagii*, for proceedings in dower, and for other purposes; and the legal authors of the fifteenth, sixteenth, and seventeenth centuries when writing in Latin, or interlarding their French or English with Latin phrases, continued to use *valor* for the value generally of property, either capital or annual. *Valor* is also found in Scotch law until late in the eighteenth century.²⁴ The word also was used in the sense of appraisal or valuation; as in Domesday and in the lists of the annual value of benefices made for the Popes in the Middle Ages and later for the Crown. See those of Innocent IV (1253) and Nicholas IV (1288), the Nova Taxatio of 1318, and the Valor Ecclesiastus, Liber Regis, or Liber Valorum, compiled under Stat. 26 H. 8, ch. 3 and subsequent laws.

Both *valor* and *valentia* were in common use in the sixteenth century; and the former is to be found in a passage in Marlowe's Doctor Faustus, written about 1590. The learned doctor is represented as quoting "Justinian" to this effect:

Physic, farewell. Where is Justinian?
Si una eademque res legatur
Duobus, alter rem, alter valorem rei,
A pretty case of paltry legacies.²⁵

Valentia is now quite obsolete; but *valor* has survived in the phrase *ad valorem*, still used in customs' acts and occasionally in other connections. It may be remarked that not only are these words of post-classic origin, but the grammar is not classic Latin. *Valentiae*

²³ In Robert of Brunnes' "Handlyng Synne," line 5966. See other instances in the Oxford Dictionary. The word was sometimes spelled "valour" or "valure."

²⁴ See KAMES' PRINCIPLES OF EQUITY, ed. of 1825, 358, 462.

²⁵ The reference is perhaps to DIG., lib. 30, § 33, which, it may be said, incidentally, does not state the law according to Marlowe, and in which the word used for value is not *valor* but *pretium*. Neither here nor anywhere in the Corpus Juris is the word *valor* to be found.

or *valoris*, the *genetivus pretii* of the grammarians, should have been used; and *valoris* was sometimes used by early English writers.

Coming now to the controversy over the use of *pretium* or *valentia* in a writ of trespass, we find that *valentia*, generally spelled *valencia*, seems to have been used from the beginning in the *ad damnum* clause; the usual conclusion of the writ being that the plaintiff says that by reason of etc. he *deterioratus est et damnum habet ad valentiam* so many pounds or shillings. Where the suit was for the destruction or abstraction of personal property it was considered necessary to allege in the body of the writ that the property had a certain value; and it was on this point that the dispute arose. Originally *pretium* and *valentia* seem to have been used indifferently in this clause in a writ of trespass; as also in other writs, such as those involving a valuation of property in proceedings of dower, partition, wardship and the like. Some diversity of practice, however, arose during the fifteenth century with respect to the use of *pretium* and *valentia* in the descriptive clause in a writ of trespass, and in the next century it was contended by some lawyers that an erroneous selection between these words was cause for the abatement of the writ. It was also claimed that the same rule applied to a presentment or indictment for larceny or trespass. The controversy seems to have been started by Thomas Marrow, or Marow, a sergeant at law who delivered a course of lectures at the Inner Temple in the year 1503 on the duties of Justices of the Peace.²⁶ Marrow's views were the basis of the discussion of the subject by Fleetwood, Lambard and other sixteenth-century writers; and the question figures in the law reports as early as the middle of the sixteenth century. It was not settled till the case of *Usher v. Bushell*, decided in 1661.²⁷

According to Marrow, in a presentment for trespass or the asportation of or damage to personal property, it was necessary of some things to say *precii* so much, and of other things *ad valenciam* so much, and the use of the wrong phrase made the indictment bad in law. He mentions about twelve cases in which *precii* must

²⁶ Marrow died in 1505 and the lectures have never been printed; but several manuscripts, consisting apparently of notes taken down by students in the law-French of the period, have survived. One of them is being edited for the "Oxford Studies in Social and Legal History," by Miss Bertha H. Putnam, associate professor of history at Mount Holyoke College.

²⁷ *Infra*, p. 25.

be used, about a half dozen in which *ad valenciam* is the proper phrase, and an equal number in which neither phrase should be used. One distinction is between living animals and inanimate property; another between a definite number of units and an indefinite quantity; another between a single article and several; another between foreign coins which are current in England and those which are not; and so on. The two dozen distinctions cannot be justified by any consistent theory which the writer has been able to formulate. They seem to be arbitrary and fanciful, and they were evidently so regarded by Marrow's contemporaries and successors. Fitzherbert in his *Natura Brevium* (1534) denies that the distinction between *pretium* and *valentia* for use in a writ of trespass is valid.²⁸ Lambard in his *Eirenarcha* or Treatise on the Office of Justice of the Peace, (1579-1582) says that "the value (or price) of the thing is commonly to be declared; in felony, to make it appear (distinct) from petit Larcinie: and in Trespasse, to aggravate the fault and fine;" quotes extensively from Marrow; and appears to think that authority for the latter's views can be found in the Year Books and the Register of Writs. He concludes, however, with the following statement:

"Sundry other dainty and nice differences doth M. Marrow make, where a man shal say *praetii*, and where *ad valentiam*, binding the Enditement to that rule which the Register taketh for original Writs of Trespasse: But for as much as Nele (9. E. 4. 26) sayeth, that Enditements bee not tied to that forme, and because that rule of the Register is not verye constantly observed in Trespasse itselfe (as a thing not materiall, in the opinion of Ma. Fitzh. in his Nat. Br. fol. 88), I thoughte it best to make choyce of these (that I have) for publike use, and to leave the rest for private learning."²⁹

West's *Symboleography* (1590)³⁰ quotes, without acknowledgment, some of the distinctions asserted by Marrow and discredited by Lambard.

Cowel's "Interpreter" (1607) under "Value" says that "Valencia, valor is a known word, yet West nicely distinguishes between value and price," and then quotes from the *Symboleography* without further comment.

²⁸ Fol. 88M — "Et per ceo appiert, sil soit viue chose ou mort chose, de q laction soit port, il nest material sil dit precii &c. vel ad valentiam &c." See also *supra*, note 26.

²⁹ Ed. 1582, pp. 395, 396.

³⁰ Part 2, § 70; ed. of 1627, fol. 95 b.

In the case of *Mounteagle v. Worcester*,³¹ decided by the court of Common Pleas in 1555, the question was raised whether in trover for a chain it was proper to allege in the writ *precii* 100 marks. It was suggested that *ad valorem* should have been used because the chain was a "mort chattel," and reference was made to the Register of Writs and the practice in trespass; but (as nearly as can be made out from the report in Dyer) the point was not regarded with favor, and the final decision appears to have been that the writ was good.³² *Wood v. Smith*³³ (1606) was trover for the conversion of various articles, and the court refers to the difference between price and value. *Southern v. How*³⁴ (K. B. 1618) was an action on the case for fraud in the sale of jewels, and Doddridge, J., refers to the "difference between *pretii* and *valoris*." In *Dell v. Brown*³⁵ (1649) we have a case of trespass in which the distinction between *pretii* and *ad valentiam* was said by Rolle, C. J., to be sound. Finally, in *Usher v. Bushell*³⁶ (1651), a case of trespass, the Court of Kings Bench swept these "dainty and nice differences" away by holding that either *pretii* or *ad valorem* could be used. Hale in his History of Crown Pleas³⁷ (written before 1676) and Hawkins in his Pleas of the Crown³⁸ (1716), both agree that the distinction was never sound as applied to either writs or indictments.

So far as the precedents go, the writer has been unable to discover any sure judicial basis for the distinction between price and value which seems to have troubled the lawyers and judges from 1500 to 1650. The words "value" and "price" appear to have been used interchangeably in acts of Parliament;³⁹ the cases cited from the Year Books are inconclusive; Statham's Abridgement (*circa* 1470) contains ninety-five cases under "Trans" (= transgressio or trespass), but nothing to indicate any legal difference between price and value in writs of trespass; the case in Dyer is

³¹ Dyer, fol. 121; Benl. & Dal., p. 41, pl. 73 (1555).

³² Counsel for plaintiff might have cited the appeal of robbery set out in BRACTON, fol. 146, in which a gold chain and a robe are alleged to be *talīs precii*. See *infra* p. 26.

³³ Cro. Jac. 129 (1606).

³⁴ Cro. Jac. 468 (1618).

³⁵ Style, 174, 182 (1649).

³⁶ Sid. 39 (1651).

³⁷ First Am. ed., vol. 2, p. 183.

³⁸ Bk. 2, ch. 25, 8th ed., vol. 2, p. 322.

³⁹ See, for instance, "le pris et valure" of wool in the subsidy or tax act of 31 HEN. VI, ch. 8.

against the distinction; the actual practice in drawing writs, as disclosed in the "Registrum Brevium," was not uniform; the high authority of Fitzherbert is that it was immaterial whether one used *precii* or *ad valentiam*; and the final decision of the courts was to the same effect. Other evidence in support of this conclusion is to be found in the Coroners' Rolls⁴⁰ where *precii* is frequently associated with single inanimate objects; the writ of admeasurement of dower in Bracton's Note Book⁴¹ in which a building is described as *precii* so much; the use by Bracton⁴² already referred to of *precii* in connection with a gold ring and a robe; the use by Fitzherbert⁴³ of a sword, a necklace, etc., as *precii* or *valoris* so much; the description of a ship *precii* so much in the Registrum Brevium, 95 a, 102 b.

For a modern case see *State v. Sparks*,⁴⁴ where an indictment for the larceny of property with a "price" of \$100, was held good under a statute which said property of the "value" of \$100.

The present writer concludes that the difficulty arose largely in the technical mind of Thomas Marrow, and, as by itself it has no bearing on the basis or methods of valuation, it would not have been thought worth discussing, except for the apparent attempt in one of the cases, *Southern v. How*,⁴⁵ and also by Lilly in his Abridgement⁴⁶ (1719), to spell some principles or definitions in the substantive law of valuation out of the assumed distinction between price and value. *Southern v. How* is very badly reported;⁴⁷ but it is apparently the case referred to by Lilly, and that author evidently thought that the court meant to draw certain legal distinctions between value generally and market value. The present writer is unable to make any sense out of either case or comment.

The almost complete absence of valuation law in England is largely to be accounted for by the treatment of all questions of value as matters of fact respecting which the decision of the trial court and jury was final. The leading case on this point would

⁴⁰ SEL. SOC. SELECT CORONERS' ROLLS, pp. 22, 92, 100.

⁴¹ No. 632, vol. 2, p. 482.

⁴² DE LEG., fol. 146.

⁴³ Justice of the Peace, 245b-246b.

⁴⁴ 30 W. Va. 101, 3 S. E. 40 (1887).

⁴⁵ Cro. Jac. 468.

⁴⁶ Vol. 2, pp. 628-629.

⁴⁷ The report in 2 Roll. Rep. 26 is even more meager than that in Cro. Jac. 468.

seem to be *Hixt v. Goats*⁴⁸ (1615), in which the Court of Kings Bench sustained a verdict of £400 in a suit by the vendee in a contract of sale for a deficit in the number of acres to be conveyed, which deficit, figured at the contract price, £11 per acre, amounted to £700. Coke, C. J., says (as translated by Dean Pound in his "Readings"):

"It seems to be good enough, for there may be divers reasons why in equity they ought not to give so much damage as this amount, for it seems here that the jurors are chancellors, and it seems such verdict is good in an action on the case because only damages are to be recovered."

Another case cited in Dean Pound's "Readings" is *Ravencroft v. Eyles*⁴⁹ (1766), an action against a sheriff for damages caused by permitting a debtor to escape. A verdict for the plaintiff was sustained; the court, per Wilmot, C. J., saying:⁵⁰

"The quantum of the damages is nothing to the purpose, for if the jury had power in this case to give damages, we must now take it that they have done right; and I am of the opinion that the jury were not confined to give the exact damages in the final judgment, but had a power and discretion to assess what damages they thought proper, for this being an action upon the case, the damages were totally uncertain and at large."

These authorities certainly go far towards explaining the lack of valuation law in damage cases;⁵¹ but they do not, in terms, account for the same absence of rules of valuation and evidence in partitions and other real actions or in detinue, replevin, tax cases, and other early common-law proceedings which involved the valuation of property. It may, of course, be that the rule laid down in *Hixt v. Goats* was understood to apply to all judicial valuations, and that, as intimated at the beginning of this article, no necessity for uniformity of decision, that is for the elaboration of rules of law, in cases of property valuation was perceived until an astonishingly late period in the development of our law. The writer cannot, however, avoid the suspicion that somewhere in the morass of medieval and post-medieval Anglo-French reports and legal docu-

⁴⁸ 1 Rolle, 257 (1615).

⁴⁹ 2 Wilson, 294 (1766).

⁵⁰ Page 295.

⁵¹ According to Professor Pound's views the damages in actions of tort were at large, at least until the end of the eighteenth century.

ments some one more industrious or fortunate than he has been may discover some real law on the subject which he has overlooked.

The eighteenth century was almost as unproductive of valuation law as any of its predecessors. The only decisions on the subject which the writer has found are those relating to the legal determination of the annual value of property for purposes of taxation.

The original Poor Relief Act,⁵² which merely authorized the overseers to raise "by taxation . . . competent sums" for the relief of the poor, without stating any principle or method of assessment, was construed from the beginning as contemplating a tax on the net annual value of the land to the occupier. The "land tax" of 1692,⁵³ provided for a tax on the "true yearly value" or the "full yearly value" of property, but laid down no basis of assessment, and it became the custom to adopt the net poor-rate valuations.

Under these statutes certain legal rules of valuation were worked out in the eighteenth century and the early part of the nineteenth; the most important of which were the rule that the object to be sought is the fair annual value of the property as it stands considered as unencumbered or unaffected (except by way of evidence) by outstanding leases, and irrespective of the fact that an actual lease may carry a rent greater or less, as the case may be, than the fair rental value of the property;⁵⁴ and the rule that annual value means the net income to be fairly expected from year to year, not the possibly greater or smaller income of the year for which the tax is levied.⁵⁵ These rules are still good law for application to the determination of annual value, either as a finality in itself, or as evidence of capital value.

These cases on taxation showed the necessity for rules of law for the guidance of courts and juries in the valuation of property, and by the middle of the nineteenth century it was well settled in England that there are certain definite rules or methods of valuation, which must be adhered to by trial courts and juries.⁵⁶ This prin-

⁵² STAT. 43 ELIZ. ch. 2.

⁵³ Established by STAT. 4 W. & M., ch. 1.

⁵⁴ *King v. Skingle*, 7 T. R. 549 (1798); *King v. Bedworth*, 8 East, 387 (1807).

⁵⁵ *Atkins v. Davis*, Cald. 317 (1783); *King v. Hull Dock Co.*, 5 M. & S. 394 (1816); *King v. Agar*, 14 East, 256 (1811).

⁵⁶ See *Alder v. Keighley*, 15 M. & W. 117, 120 (1846); *Hadley v. Baxendale*, 9 Ex.

ciple had been recognized by the courts of this country half a century earlier.⁵⁷

From this time on, the valuation of property has occupied a constantly increasing share of judicial attention, until at the present time there is hardly any branch of law which is not concerned more or less with property values. The result is an enormous and rapidly increasing number of valuation cases, and a vast amount of discussion about the definitions, methods, and rules of law which are to be observed in the valuation of property.

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341, 354 (1854). For a recent English opinion to the contrary see BROWNE AND ALLAN, *LAW OF COMPENSATION*, 2 ed. p. 543, where the authors, writing of the Lands Clauses Acts, say: "Strictly the law has nothing to do with the way in which an arbitrator arrives at the amount. Its function is to define the subject to be assessed." This is not a correct statement of the law of eminent domain as administered in England ever since the enactment of the original Lands Clauses Act in 1845; but it illustrates what is still a tendency of the courts.

⁵⁷ *Walker v. Smith*, 1 Wash. C. C. (U. S.) 152, 154 (1804). On this development of the law of damages see SEDGWICK, §§ 19, 31, and the long list of authorities in 17 C. J., pp. 1061, 1067.